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IN THE

Supreme Court of the United States.

INDIANAPOLIS BREWING COMPANY, INC., an Indiana Corporation,

Appellant,

v.

THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN; EDWARD W. McFARLAND, HALE G. KNIGHT, and VEROLD F. GORMELY, Individually and as Members of the Liquor Control Commission of the State of Michigan; FRANK MURPHY, and LEON D. CASE, Individually and as Members ex officio of the Liquor Control Commission of the State of Michigan; RAYMOND W. STARR, Individually and as Attorney-General of the State of Michigan,

Appellees.

No. .....

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM THE ORDERS OF THE DISTRICT COURT.

I.

STATEMENT OF THE CASE.

This is an appeal from an order and decree of the District Court of the United States for the Eastern District of Michigan, Southern Division, with three judges sitting, under Section 266, Judicial Code (28 U. S. C. A.,

par. 380), entered March 7, 1938, denying the appellant's prayer for an interlocutory injunction dismissing the appellant's bill of complaint. The appellant's bill sought both an interlocutory injunction and a permanent injunction against the Liquor Control Commission of the State of Michigan and its coappellees, being the law-enforcing officers of the State of Michigan, restraining the appellees from enforcing Section 40 of Act No. 8 of the Public Acts of the State of Michigan, Extra Session, 1933, as amended by Act No. 281, Public Acts of the State of Michigan, 1937, and from enforcing a regulation of said Commission made on the 14th day of December, 1937, under color of the authority of amended Section 40.

An appeal having been allowed the appellant on April 27, 1938, and the requisite papers and notices having been served upon the appellees, the appellees, by counsel, filed in the District Court below a motion to affirm the judgment of the lower court, with supporting brief.

II.

GROUNDS URGED BY APPELLEES.

The reasons urged by the appellees for affirming the orders appealed from are solely to the effect that the questions involved are unsubstantial, and that their decision is foreclosed by a former decision of the Supreme Court of the United States.

The appellant joins issue with these contentions.

III.

NATURE OF THE QUESTIONS INVOLVED.

The constitutionality of the following amended Section 40 of the Michigan Act cited above and of regulation

adopted thereunder, and hereinafter set out, constitutes the question involved.

(Amended Section 40 of the Michigan Act:)

"The commission shall forthwith adopt a regulation designating the states, the laws, or the rules or regulations of which are found to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in this state; or which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license; or which prohibit licensed wholesalers of beer therein from possessing or selling beer purchased in this state, unless the one from whom purchased has secured a license and paid a fee therein, when such seller neither transports the beer into said state nor sells the same therein; or which impose any higher taxes or inspection fees upon beer manufactured in this state when transporting into or sold therein, than is imposed upon beer manufactured and sold within said state, the regulation adopted shall prohibit all licensees from purchasing, receiving, possessing, or selling any beer manufactured in any state therein designated, said regulation to become effective ninety days after its adoption. Any licensee or person adversely affected shall be entitled to review by certiorari to the proper court the question as to whether the commission has acted illegally or in excess of authority in making its finding with respect to any state."

(Regulation of Liquor Control Commission:)

"Pursuant to Act No. 8, Public Acts, Extra Session of the year 1933 of the State of Michigan, as amended by Act No. 241 of the Public Act for the year 1935, and Act No. 281 of the Public Act for the year 1937, par-

ticularly Section 40 thereof, the Michigan Liquor Control Commission promulgates and adopts the following rule and regulation designating as discriminatory according to Section 40 of said Act the following States: Maine, Maryland, Nevada, Indiana, New Hampshire, North Carolina, Pennsylvania, Tennessee, Vermont, Washington. These designations are made after a careful examination of the laws and rules and regulations of the aforementioned states."

The above-quoted statutory provisions and regulations are set out in paragraph B of appellant's jurisdictional statement filed with his petition for appeal.

It appears from the grounds of challenge, particularly set out under paragraph D (aa), (bb), (cc) and (dd) in the jurisdictional statement that the validity of the foregoing statute and regulation is challenged as being in conflict with the Commerce Clause, the Equal Protection Clause and the second clause of the Twenty-first Amendment of the Federal Constitution because this statute is not designed to police or regulate the alcoholic traffic within the State of Michigan, but is designed solely to constrain the other states of the Union to alter their present policing regulations and to permit the sale of Michigan beer within such other states free of such policing regulations; and in respect to the Fourteenth Amendment, because the act created an unreasonable classification, not as between the manufacturers of beer in the State of Michigan as one class and all the manufacturers of beer outside the State of Michigan as another class but because it arbitrarily and unreasonably classified the manufacturers whose plants were located outside the State of Michigan with reference to whether or not the laws of their respective domiciles contained or did not contain the provisions obnoxious to amended Section 40 of the Michigan act.

The holding of the court below appears in 21 Fed. Supp. 969 (Current Advance Sheets March 21, 1938).

IV.

NOVELTY OF THE QUESTION.

The constitutionality of liquor legislation of the purely retaliatory type has not yet been presented to this Court. The statute of Michigan is unquestionably a statute of this type. It is quite apparent, as will be more specifically noted below, even from the opinion of the Three-Judge Court upholding the statute that the statute makes no pretense at having for its object the regulation or control of the liquor traffic within the State of Michigan. The undisputed object of the statute is to constrain such sister states as may have policing regulations which, while not prohibiting the importation of beer from the State of Michigan, provide a differentiation of method in the handling of imported beer from that applied to domestic beer. The pressure applied to the legislatures of the sister states consists in the exclusion of beer produced in such states from importation into Michigan until such time as the legislatures of the sister states conform to the Michigan standards. The ultimate object of the law is to promote throughout other states in the Union the sale of beer produced in Michigan.

The opinion of the court below pays scant heed to these considerations, and holds that because the sale of Michigan beer in other states would promote prosperity within Michigan the challenged law has a legitimate object within the police power of the state, and is not violative of the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution. The court below ignored, al-

though it did not deny, the presence in appellant's bill of complaint of appellant's contention that amended Section 40 was also violative of the Commerce Clause of the Federal Constitution, which contention of the appellant was plainly made in his amended and supplemental bill of complaint. (See clauses 5 and 11 in the amended and supplemental bill of complaint, and, also, paragraph D-e in appellant's jurisdictional statement.) The appellant recited in its bill that it had long been engaged in shipping beer manufactured in its plant in Indiana into Michigan as a licensed importer to the licensed wholesalers in the State of Michigan, and that it enjoyed a valuable trade and good will in respect to the beer manufactured in Indiana and shipped into Michigan.

V.

CONTENTIONS OF THE APPELLANT.

The appellant contends that as to both the immediate object of the law—namely, the constraint upon the several states to abandon their sovereignty under the Twenty-first Amendment to enact policing regulations governing the importations of foreign beer—and as to the further object of the law to secure the uninterrupted flow of beer as a commodity in interstate commerce free from the vexations of local police regulations, the Michigan statute contravenes the policy of the Twenty-first Amendment, seeks to defeat the purpose of the amendment, and therefore cannot be within the intent of the amendment. In fact, the Michigan act was enacted to bring about a state of affairs which the second clause of the Twenty-first Amendment sought to prevent forever—namely, interference with the police regulations of a state governing alcoholic beverages orig-

inating outside of its jurisdiction. Moreover, since the object of the Michigan statute is extraterritorial, inasmuch as it seeks to break down police barriers erected by a sister state, it constitutes a serious threat to the integrity of the Twenty-first Amendment itself.

The appellant further contends that amended section 40, in view of the foregoing considerations and the further necessary effect thereof, arbitrarily classifies the manufacturers of beer whose plants are located outside the State of Michigan in states where the laws do not conform to the standards of the Michigan act as one class, and manufacturers of beer whose plants are located outside Michigan in states where the laws do not conform to the standards as another class. That this classification is not prescribed by the second clause of the Twenty-first Amendment, and violates the equal-protection clause of the Fourteenth Amendment.

In fine, the appellant contends the type of law which a sister state may enact in policing alcoholic traffic within or into its territory cannot be made the criterion of the exclusion of the beer produced therein from importation into another state, and that such an act is unconstitutionally designed to accomplish extraterritorial objects and to obstruct the achievement of the purpose of the Twenty-first Amendment, and violates the commerce clause and the Fourteenth Amendment.

We submit that these questions are not only undetermined by previous decisions of this Court, but are essentially substantial questions.

VI.

OBSERVATIONS AND AUTHORITIES IN SUPPORT OF APPELLANT'S CONTENTIONS.

Exhibit III, attached to the appellant's statement of jurisdiction, quotes paragraph H in clause 11 of the plaintiff's amended and supplemental bill, which was expressly found to be true by the Court. This portion of the bill alleged in detail the statistics of the importations into Michigan of beer from the ten states named in the regulation, the products of which were thereby barred from Michigan, and alleged that of the ten states named in the regulation Vermont has no breweries and consequently imports no beer into Michigan; that the States of Maine, Nevada, New Hampshire, North Carolina, Tennessee and Washington, remotely situated from the State of Michigan, have not shipped any alcoholic malt beverages into that state, and that of the remaining three states, Maryland, Pennsylvania and Indiana, the latter is the only state which has been selling any substantial amount of alcoholic malt beverages in Michigan; and, further, this portion of the bill set out in detail the number of breweries and production of beer within the States of Illinois, Missouri, Ohio and Wisconsin, which latter states were not barred from shipping into Michigan, and disclosed, quoting from the bill:

> "That in the four States of Illinois, Missouri, Ohio and Wisconsin, which, as above alleged, produced and imported into the State of Michigan in excess of two-thirds of the total amount of beer imported into the State of Michigan during said period, are located the number of breweries as above set out which are capable of producing and importing into the State of

> Michigan far more beer in addition to that already being imported into the State of Michigan therefrom than was produced in the State of Indiana and shipped into the State of Michigan."

It follows that in the face of the Court's own finding of fact, the Court made an unsound assumption that the purpose of the Act was to protect the Michigan market for domestic beer. If such was the case, legislation would naturally be directed toward excluding the outstanding beer-producing States of Illinois, Missouri, Ohio and Wisconsin, which poured more than two-thirds of all foreign importations of beer into Michigan within the long period set out in the bill, and not toward states which either produced no beer or actually shipped but a relatively small amount of beer into Michigan.

As determined therefore not by the assumption of the Court, but by its actual findings, the entire purpose of the legislation was to promote the sale of beer outside that state. In other words, it was directly aimed at achieving an extraterritorial effect both in respect to the economic pressure thereby applied to the Legislature of its sister states, but also in respect to the promotion of the sale of Michigan beer outside its territory.

Of course, the Court's opinion nowhere denies in terms that a purely retaliatory statute is unconstitutional and not within the purview of the Twenty-first Amendment. The Court in its opinion observes:

> "It is not an unreasonable classification to discriminate against out of state products in respect to their source, when the laws of the state of origin create the evil sought to be remedied and the classification operates equally upon all who fall within its reach."

There is, therefore, an implied concession, even in the opinion of the Court, that the evils sought to be remedied actually consist in the provisions of the statutes of a sister state, although those statutes are warranted under the Twenty-first Amendment and are purely of a police character.

It is undeniable that the thrust of this retaliatory type of legislation is ulterior, involves the national economy and disturbs the harmonious relationships of the states within the Union.

The situation is analogous to the Louisiana statute denounced in Foster-Fountain Packing Co., Inc., et al. v. E. J. Haydel et al., 278 U. S. 1, 13, the opinion in which pointed out that:

> "The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of the brand in Louisiana by holding raw unshelled shrimp from the Biloxi (Miss.) plants."

In Pennsylvania v. West Virginia, 262 U. S. 553, 593, the opinion of the Court, speaking of the Commerce Clause, runs:

> "The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference from conflicting or hostile state laws and to insure uniformity and regulation. It means that in the matter of interstate commerce we are a single nation, one and the same people. All the states have assented to it, all are alike bound by it and all are equally protected by it, even their power to lay and collect taxes, comprehensive and necessary as that power is, it cannot be extended in any way which involves discrimination against such commerce."

Likewise in this connection the following language of this Court becomes pertinent:

> "To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the republic was organized. When that equality disappears we may remain a free people, but the union will not be the union of the Constitution."
>
> Coyle v. Smith, 221 U. S. 559, 567, 580 (55 L. Ed. 853, 858, 863) (1910).

If the second clause of the Twenty-first Amendment authorizes a state to establish barriers to the importation of alcoholic beverages from other states solely for the purpose of augmenting the flow of beer from the enacting state into the territory of its sister states, and if, for the purpose of accomplishing such extraterritorial effect the enacting state can annex as a condition precedent to the right to import into its own borders any sort of a provision whatever, certainly, many disastrous results will ensue both to the harmonious relationship of the states of the Union and to the integrity of the Twenty-first Amendment itself.

For example, the four States of Kentucky, Pennsylvania, Illinois and Indiana, in the fiscal year 1937, produced about 86 per cent of all the whisky manufactured in the United States (U. S. Treas. Dept. Statistics on Distilled Spirits, fiscal year 1937, p. 7). If the right of the several states to attach any sort of a condition as a prerequisite to the admission of out-of-state liquor be unlimited, then these four states are placed in a position of serious embarrassment in respect not only to the distilling interests within said states, but in respect also to the freedom of these states as to their own state purchases

of material and supplies, because Michigan or Missouri, whose manufacture of liquor is negligible, might prescribe that no spiritous beverages could be imported from any state unless that state, in its state purchases of fuel, road material, building material or other supplies gave preference to the materials and supplies manufactured in Michigan or Missouri.

As was well observed by Justice Cardozo in Baldwin v. Selig, 294 U. S. 511, 532, "The Constitution • • • was framed upon the theory that the peoples of the several states must sink or swim together and that in the long run prosperity and salvation are in union and not division."

The Michigan Act does not subserve the purpose of the Twenty-first Amendment, which undoubtedly was to enable the states to maintain their own policing regulations as to alcohol without disturbance through importation from other states. The object of the present legislation is to constrain and coerce the states to forego the advantages of the Twenty-first Amendment, and to enforce the free and uninterrupted flow of beer as an industrial commodity. This is apparent in the opinion of the three-judge court, and also in the propaganda published in support of the retaliatory type of legislation. We quote from an article in Brewery Age (Feb. Number, 1938, p. 8).

> "States which have discriminatory laws then will have but two alternatives: either to remove all discriminations or to have highly important outstate markets closed to them. They will, we are confident, take the former course, with the net result that ultimately beer will enjoy the same freedom in interstate commerce afforded to all other legitimate articles of commerce, a status that is to be highly desired for the good of the brewing industry as a whole."

Undoubtedly the commerce clause was intended to prevent retaliation by one state against the products of another moving in interstate commerce. This clause, of course, was adopted not only to secure the freedom of interstate commerce, but to preserve harmonious relations among the states. The second section of the Twenty-first Amendment was unquestionably enacted to enable a state to preserve its jurisdiction intact in respect to the regulation or the prohibition of liquor traffic within its borders. The objects of both these constitutional provisions are still public desiderata. The people of the United States are entitled to enjoy the benefits of both of these constitutional provisions. These provisions are susceptible of harmonious construction. Any apparent conflict may be reconciled so as to carry out all of these objects. They may be reconciled along the lines of a formula which will uphold the policing regulations of a state, though incidentally discriminating against the alcoholic products of other states, but will denounce legislation if the true object thereof is retaliation and not the policing of the traffic.

If such a formula cannot be written the Twenty-first Amendment becomes a sword to advance in other states the commercial interests of the liquor industry domiciled within the enacting state and ceases to be a shield to protect the states from interference in the administration of their domestic policies. The maintenance of the integrity of the Twenty-first Amendment, which is the latest utterance of the sovereign people, surely requires that a line of demarcation be defined which, on the one hand, will leave the states perfectly free to deal with their domestic problems of liquor control without interference by other states; and, on the other, will inhibit interference with interstate commerce by retaliatory legislation designed solely to

thwart and not to secure the beneficent objects of the second section of the Twenty-first Amendment.

Certain further observations are warranted in respect to the assumptions by the trial court that the purpose of the challenged legislation is to protect the domestic market within Michigan for the breweries of that state contrary to the facts alleged in the bill and found to be true by the Court. The criterion established by the Act consisting in whether or not certain provisions exist in the laws of the manufacturing states, appears from the facts found by the Court and detailed in paragraph H set out in Exhibit III of the jurisdictional statement, to be wholly unrelated to the amount of beer shipped by any of the states involved into Michigan. Among the facts found by the Court are, that during the first nine calendar months of the year 1937 the amount of beer produced in other states and shipped into Michigan and there consumed was about 20 per cent of the total amount of beer consumed in the State of Michigan; that the States of Illinois, Missouri, Ohio and Wisconsin shipped two-thirds of this amount imported into Michigan during that period, but the laws of the States of Illinois, Ohio, Missouri and Wisconsin do not contain any of the provisions recited in the Michigan Act which would render their beer subject to exclusion from Michigan; that, moreover, as detailed in this portion of the bill and found to be true, the breweries of the four states just named are capable of producing and shipping into Michigan more beer than was produced in the State of Indiana and shipped into the State of Michigan. That during the first ten calendar months in the year 1937 there were imported into the State of Michigan but 145,250 barrels of beer produced in Indiana. Moreover, the statistics contained in said bill, and found to be true, showed that Illinois had sixty-two breweries compared to seventeen in In-

diana, and that the sixty-two breweries in Illinois produced 4,059,423 barrels of beer, compared to about half that amount produced in Indiana, and that the figures of production in Ohio were also practically twice the amount of beer produced in Indiana, and that the State of Missouri likewise far exceeded the State of Indiana in production of beer. We repeat, therefore, that it was factually shown in the Court's finding that whether or not the laws of a particular state did or did not contain the provisions denounced in Section 40 of the Michigan Act as obnoxious was utterly without any relation to the amount of beer produced in such state and shipped into Michigan, and that, consequently, the only inference deducible from this factual situation is that the design of the law as applied to the actualities of the situation was to promote the sale of Michigan beer in out-of-state markets and not to preserve or protect the Michigan market for its domestic breweries.

The assumption of the Court to the contrary is utterly at variance to the findings of fact. This is also true of several other assumptions in the Court's opinion, which this Court, of course, is at liberty to review fully, since all the facts alleged in the bill are found to be true and will necessarily be before this Court upon appeal.

VII.

NO RULING PRECEDENTS FORECLOSING THE CONTROVERSY.

State Board of Equalization v. Young's Market Co., 299 U. S. 59 (1936), does not deal with retaliatory type of statute such as is here involved nor does this opinion in any sense pass upon the relative scope of the Twenty-first Amendment and the commerce clause.

The case of Mahoney v. Joseph Triner Corporation, No. 761, decided May 23, 1938, in this court, likewise expressly refrains from passing upon any questions arising under the commerce clause in relation to the Twenty-first Amendment, for the opinion expressly states: "The sole contention of Joseph Triner Corp. is that the statute violated is the equal protection clause."

Likewise, in the Mahoney case, the statute of Minnesota there involved was not of the retaliatory type.

In each of these cases the state law in question discriminated between the domestic products of the enacting state on the one hand and similar products of all the remaining states of the Union on the other. Neither of these cases supports the proposition that a state has the right, under the Twenty-first Amendment, absolutely to bar the products of some of its sister states from its domestic markets while permitting precisely the same kind of products of the rest of its sister states to enter such markets merely because it desires to punish the first-mentioned states for having local laws governing the liquor traffic within their respective borders which are not to its liking.

It is also apparent that the Court in the Mahoney case refused to consider the reasonableness of the challenged provision of the Minnesota Act, since the classification under all circumstances was between all out-of-state manufacturers as one class and all domestic manufacturers as the other, and, as held in the Young's Market case, this particular classification is expressly recognized in the Twenty-first Amendment.

It is fallacious to assume, as has the court below, that because conceivably any or all the states might enact statutes containing provisions prescribed by the Michigan Act, the classification consists of but two classes of manufacturers, those whose plants are within Michigan being one

class, those outside another class. Actually at the moment of the enactment of this statute such was not the case. Practically, and in the light of human experience, this act creates a classification among outside manufacturers, and, therefore, is not the classification "recognized by the Twenty-first Amendment."

CONCLUSION.

We make two observations.

It is not reasonable that the object of amended section 40 is to preserve the Michigan market rather than to open up outside markets when its application is made to turn entirely upon the particular terms upon which a sister state may admit Michigan beer into the territory of such sister state.

It is likewise difficult to conceive of a retaliatory act being upheld under the Twenty-first Amendment by tacit acquiescence in the holding of an inferior court, when the validity of a retaliatory act has never been considered by this Court under this amendment.

Respectfully submitted,

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